APPENDIX A — SUMMARY ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT FILED FEBRUARY 19, 2010

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 19th day of February, two thousand ten.

PRESENT:

ROBERT D. SACK,
ROBERT A. KATZMANN,
Circuit Judges,
JED S. RAKOFF,*
District Judge.

No. 07-4214-cv

U.S. INFORMATION SYSTEMS, INC., ODYSSEY GROUP INC., and BLUE DIAMOND FIBER OPTIC NETWORKS, INC.,

Plaintiffs-Counter-Defendants-Appellants,

- v -

* The Honorable Jed S. Rakoff, of the United States District Court for the Southern District of New York, sitting by designation.

Appendix A

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION NUMBER 3, ADCO ELECTRICAL CORPORATION, FIVE STAR ELECTRIC CORPORATION, NEAD INFORMATION SYSTEMS, and HUGH O'KANE ELECTRIC COMPANY LLC,

Defendants-Appellees,

A & R ELECTRICAL, MAINTENANCE, INC., FOREST ELECTRIC CORPORATION, and IPC COMMUNICATIONS, INC.,

Defendants,

A R COMMUNICATIONS CONTRACTORS INC.,

Counter-Claimant-Appellee.

SUMMARY ORDER

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the district court be, and it hereby is, AFFIRMED.

Plaintiffs-Counter-Defendants-Appellants U.S. Information Systems, Inc., Odyssey Group Inc., and Blue Diamond Fiber Optic Networks, Inc. appeal from the order and judgment of the United States District Court for the Southern District of New York adopting the Report and Recommendation of United States

Magistrate Judge James C. Francis IV and granting summary judgment to defendants-appellees International Brotherhood of Electrical Workers Local Union Number 3 ("Local 3") and various contractors who employ Local 3 workers on the appellants' claim under section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1, and dismissing the appellants' related state law claims without prejudice.

On appeal, the appellants argue that the district court erred by (1) applying an incorrect summary judgment standard, (2) ignoring testimony of the appellants' expert, (3) improperly drawing inferences in favor of the appellees, and (4) failing to consider certain evidence the appellants submitted. We assume the parties' familiarity with the factual and procedural history of the case.

"We review de novo a district court's grant of summary judgment." *Coan v. Kaufman*, 457 F.3d 250, 254 (2d Cir. 2006). "[C]onstruing the evidence in the light most favorable to the nonmoving party," *Mitchell v. Shane*, 350 F.3d 39, 47 (2d Cir. 2003), we may affirm only "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c)(2).

Here, the district court articulated the correct summary judgment standard when it said that "'[t]o survive a motion for summary judgment . . . , a plaintiff

seeking damages for a violation of § 1 [of the Sherman Act] must present evidence "that tends to exclude the possibility" that the alleged conspirators acted independently.'" *U.S. Info. Sys., Inc. v. Int'l Bhd. of Elec. Workers Local Union No. 3*, No. 00 Civ. 4763 (RMB)(JCF), 2007 WL 2746902, at *2, 2007 U.S. Dist. LEXIS 69760, at *8 (S.D.N.Y. Sept. 18, 2007) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)) (alterations in *U.S. Info. Sys.*). The appellants argue that the Supreme Court altered this standard in *Eastman Kodak Co. v. Image Technical Services*, 504 U.S. 451, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992), by stating that "*Matsushita* demands only that the nonmoving party's inferences be reasonable in order to reach the jury," *id.* at 468. We disagree. This language explains the *Matsushita* standard. It does not alter it. This view is supported by *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007), where the Supreme Court cited *Matsushita* for the proposition that "at the summary judgment stage a [Sherman Act] § 1 plaintiff's offer of conspiracy evidence must tend to rule out the possibility that the defendants were acting independently," *id.* at 554.

Here, the district court properly granted summary judgment to the appellees after concluding that "it is equally plausible that [the non-Local 3 appellees] acted in their own self-interest independent of Local 3 and of one another." *U.S. Info. Sys., Inc.*, 2007 WL 2746902, at *2, 2007 U.S. Dist. LEXIS 69760, at *8 (internal quotation marks omitted).

We conclude that the appellants' other arguments are without merit. The district court considered and rejected the views of the appellants' expert. And we find no instances in which the district court drew inferences in favor of the appellees or ignored evidence that would merit the denial of summary judgment to them under the *Matsushita* standard.

For the foregoing reasons, the judgment of the District Court is hereby AFFIRMED.

FOR THE COURT:
Catherine O'Hagan Wolfe,
Clerk of the Court

APPENDIX B — DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED SEPTEMBER 18, 2007

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

00 Civ. 4763 (RMB)(JCF)

U.S. INFORMATION SYSTEMS, INC., ODYSSEY GROUP, INC., and BLUE DIAMOND FIBER OPTIC NETWORKS, INC.,

Plaintiffs,

-against-

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION NUMBER 3, AFL-CIO, A R COMMUNICATION CONTRACTORS, INC., ADCO ELECTRICAL CORP., FIVE STAR ELECTRIC CORP., FOREST ELECTRIC CORP., HUGH O'KANE ELECTRIC COMPANY LLC, IPC COMMUNICATIONS, INC., and NEAD INFORMATION SYSTEMS,

Defendants.

Appendix B

DECISION AND ORDER

I. Background

On or about February 25, 2002, U.S. Information Systems, Inc., Odyssey Group, Inc., and Blue Diamond Fiber Optic Networks, Inc., (collectively, "Plaintiffs") filed a Second Complaint against Local Union Number 3 ("Local 3") of the International Brotherhood of Electrical Workers, AFL-CIO and several electrical contractors that employ Local 3 members (collectively, "Defendants"), alleging that Defendants "have combined and conspired with each other . . . to carry out a common plan [including engaging in work stoppages and vandalism] to coerce and induce building owners and tenants, building managers, general contractors, information technology consultants, and other in the construction industry to exclude [Plaintiffs] from the market for telecommunications installation work" in violation of the Sherman Antitrust Act, 15 U.S.C. §§ 1, 2 (2000), and the New York State Donnelly Act, N.Y. Gen. Bus. Law § 340 (McKinney 1999). (2d Compl. ¶¶ 1, 36, 41.)

On or about February 16, 2007, Defendants jointly moved "for an order of summary judgment, pursuant to Federal Rule of Civil Procedure 56, on all claims asserted by Plaintiffs against Defendants." (Defs.' Notice of Mot. for Summ. J. at 1-2.) Defendants argue, among other things, that "[t]here is no evidence of an actual agreement, no testimony concerning entry into or enforcement of the alleged agreement, no evidence

regarding discussion of or meetings about such an agreement, no evidence of ongoing efforts to monitor the agreement, and no testimony regarding who agreed to join or when." (Joint Mem. of Law in Supp. of Defs.' Mot. for Summ. J., dated Feb. 16, 2007 ("Joint Mem.") at 23.) Defendants claim that the conduct complained of amounted to "nothing more than a very few isolated instances of allegedly inappropriate behavior by a few individuals" (Joint Mem. at 15), and it was not "directed, authorized or ratified by the union." (Mem. of Law on Behalf of Local 3 in Supp. of the Mot. for Summ. J., dated Feb. 16, 2007, at 4.)

On August 3, 2007, United States Magistrate Judge James C. Francis IV, to whom this matter had been referred, issued a comprehensive and thoughtful Report and Recommendation ("Report") recommending that Defendants' summary judgment motion be granted because, among other reasons, Plaintiffs "have offered no evidence to support their claims that [Defendants] were part of a conspiracy." (Report at 30.) "[T]o survive a motion for summary judgment, it is 'critical' that the plaintiff make a threshold showing that 'a reasonable jury could find that the defendants' actions were concerted rather than independent.'" (Report at 24 (quoting *AD/SAT, Div. of Skylight, Inc. v. Associated Press*, 181 F.3d 216, 233 (2d Cir. 1999)).) "It is not clear that the employees who [allegedly may have engaged in a conspiracy] acted with the knowledge or approval of their employers." (Report at 32.) And, "[e]ven assuming that the defendant contractors endorsed or condoned [employees' alleged behavior] . . . it is entirely plausible

that they did so in the absence of any agreement with Local 3 or with one another." (Report at 32.) "Independent action is not proscribed" by Section 1 of the Sherman Act. *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 761, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984).

The Report advised that "[p]ursuant to 28 U.S.C. § 636(b)(1) and Rules 72, 6(a), and 6(e) of the Federal Rules of Civil Procedure, the parties shall have ten (10) days from this date to file written objections to this Report." (Report at 39.)

The parties filed (voluminous) objections and responses (collectively, "Objections") to the Report, including objections by the prevailing parties. On or about August 15, 2007, Plaintiffs filed objections (*see* Pls.' Objections, dated Aug. 13, 2007) accompanied by the Declaration of Maxwell M. Blecher (*see* Blecher Decl., dated Aug. 13, 2007). On or about August 17, 2007, Defendants filed objections to portions of the Report. (*See* Defs.' Objections, dated Aug. 16, 2007). On or about August 31, 2007, Defendants filed a response to Plaintiffs' objections, (*see* Defs.' Resp. to Pls.' Objections, dated Aug. 31, 2007), and on or about September 4, 2007, Plaintiffs filed a response to Defendants' objections (*see* Pls.' Opp'n to Defs.' Objections, dated Aug. 31, 2007). On or about September 10, 2007, Plaintiffs filed a reply brief in support of their objections. (*See* Pls.' Reply in Supp. of Objections, dated Sept. 6, 2007.)

For the reasons set forth below, the Court adopts the Report in its entirety.

II. Standard of Review

The court "shall make a *de novo* determination of those portions of the report or specified findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1)(C); *see also* Fed. R. Civ. P. 72(b); *Grassia v. Scully*, 892 F.2d 16, 19 (2d Cir. 1989). As to any portions of a magistrate judge's report to which no objections have been made, the district judge may adopt all findings that are not clearly erroneous. *See Thomas v. Arn*, 474 U.S. 140, 149, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985).

III. Analysis

The facts and procedural history as set forth in the Report are incorporated herein by reference unless otherwise noted. The Court has conducted a *de novo* review of, among other things, the Report, the parties' objections to the Report, the responses to those objections, and applicable legal authorities, and it concludes that Magistrate Judge Francis's legal and factual determinations are supported by the record and the law in all respects. *See Pizarro v. Bartlett*, 776 F. Supp. 815, 817 (S.D.N.Y. 1991). The parties' Objections

provide no basis for departing from the Report's conclusions and recommendations.[1]

Judge Francis concluded correctly that "this Court cannot permit an antitrust case to go to trial where the evidence is 'as consistent with permissible [competition] as with illegal conspiracy.'" (Report at 35-36 (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)).) "To survive a motion for summary judgment . . . , a plaintiff seeking damages for a violation of § 1 [of the Sherman Act] must present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently." *Matsushita*, 475 U.S. at 588 (quoting *Monsanto*, 465 U.S. at 764); *see also AD/SAT*, 181 F.3d at 221 (affirming summary judgment in favor of defendants under the *Matsushita/Monsanto* standard); *Reading Int'l., Inc. v. Oaktree Capital Mgmt. LLC*, No. 03 Civ. 1895, 2007 U.S. Dist. LEXIS 504, 2007 WL 39301, at *7 (S.D.N.Y. Jan. 8, 2007) (Crotty, J.) (same). An individual's participation in a work stoppage or slowdown or declination of "overtime in direct response to Plaintiffs' involvement on a project . . . is a legitimate and independent act to secure and preserve work for themselves." (Joint Mem. at 31.) "If there were proof that a few renegade members of Local 3 acted independently to advance their perceived interests, that conduct would not be attributable to any Defendant, much less prove a . . . conspiracy." (Joint Men. at 30.)

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1. Any Objections not specifically addressed in this Order have been considered *de novo* and rejected.

Judge Francis properly determined that "it is equally plausible that [Defendants] acted in their own self-interest independent of Local 3 and of one another." (Report at 35.)

V. Conclusion and Order

The Court adopts the Report in its entirety, and, for the reasons stated herein and therein, grants Defendants' motion for summary judgment [Dkt. #294]. The Clerk of the Court is respectfully requested to close this case.

Dated: New York, New York
September 18, 2007

s/ RMB
RICHARD M. BERMAN,
U.S.D.J.

APPENDIX C — REPORT AND RECOMMENDATION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK FILED AUGUST 3, 2007

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

00 Civ. 4763 (RMB) (JCF)

U.S. INFORMATION SYSTEMS, INC., ODYSSEY GROUP, INC. and BLUE DIAMOND FIBER OPTIC NETWORKS, INC.,

Plaintiffs,

- against -

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION NUMBER 3, AFL-CIO, A R COMMUNICATION CONTRACTORS INC., ADCO ELECTRICAL CORPORATION, FIVE STAR ELECTRIC CORPORATION, FOREST ELECTRIC CORPORATION, HUGH O'KANE ELECTRIC COMPANY LLC, IPC COMMUNICATIONS, INC. and NEAD INFORMATION SYSTEMS,

Defendants.

Appendix C

REPORT AND RECOMMENDATION

TO THE HONORABLE RICHARD M. BERMAN, U.S.D.J.:

The plaintiffs in this action are contractors that employ members of the Communication Workers of America, AFL-CIO (the "CWA") to install low-voltage telecommunications and data ("tel-data") wiring for commercial customers in the New York City metropolitan area. The defendants are Local Union Number 3 ("Local 3") of the International Brotherhood of Electrical Workers, AFL-CIO (the "IBEW") and several electrical contractors that employ Local 3 members.[1] The plaintiffs seek damages and injunctive relief, alleging that the defendants conspired to exclude CWA contractors from the tel-data installation market in violation of § 1 of the Sherman Antitrust Act,[2] 15 U.S.C. § 1, and New York State's Donnelly Act, N.Y. Gen. Bus. Law § 340. The plaintiffs have also brought common law claims for tortious interference with contract and prospective business advantage. The defendants have moved for summary judgment on each

1. I will refer to contractors that use Local 3 labor as "Local 3 contractors," and to contractors that use CWA labor as "CWA contractors."

2. The plaintiffs initially asserted claims under both § 1 and § 2 of the Sherman Antitrust Act but have since withdrawn their § 2 claims. *U.S. Info. Sys. v. IBEW Local Union No. 3*, No. 00 Civ. 4763, 2006 U.S. Dist. LEXIS 52870, 2006 WL 2136249, at *1 n.1 (S.D.N.Y. Aug. 1, 2006).

of the plaintiffs' claims.[3] For the reasons set forth below, the defendants' motion should be granted.

Background

A. *Tel-Data and Electrical Installation Markets*

Commercial construction projects in New York City are usually overseen by a general contractor or construction manager, who is hired by the owner to coordinate the process of construction. (Defendants' Joint Statement of Facts About Which There is No Genuine Dispute ("Def. 56.1 Stmt."), ¶ 4; Plaintiffs' Rule 56.1 Counterstatement in Response to Defendants' Rule 56.1 Statement ("Pl. 56.1 Stmt."), ¶ 4). The general contractor then subcontracts specific parts of the job to trade contractors that perform services such as electrical, plumbing, and dry wall installation. Electrical contractors such as the defendants generally employ trained electricians who are members of Local 3 to install high-voltage wiring and equipment. (Def. 56.1 Stmt., ¶ 7; Pl. 56.1 Stmt., ¶ 7).

Commercial construction projects often also require the installation of low-voltage electrical systems, including tel-data, fire alarm, and security systems. (Def. 56.1 Stmt., ¶ 9; Pl. 56.1 Stmt., ¶ 9). Some electrical contractors, including defendants Hugh O'Kane Electric

3. All claims against defendants IPC Communications, Inc. ("IPC") and Forest Electric Corporation have been dismissed by stipulation.

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Company LLC ("Hugh O'Kane"), Five Star Electric Corporation ("Five Star"), and ADCO Electrical Corporation ("ADCO"), also hire members of Local 3 to perform low-voltage installation. (Def. 56.1 Stmt., ¶¶ 13, 174, 215, 349; Pl. 56.1 Stmt., ¶¶ 13, 174, 215, 349). Local 3 electricians who perform low-voltage work are paid the same wage that they make when performing high-voltage work. Low-voltage systems can also be installed by members of the CWA who typically receive lower hourly wages than Local 3 members. (Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment ("Pl. Memo.") at 6, 8-9). According to the plaintiffs, this is because

> [t]raditional electrical installation, with its emphasis on high voltage work, requires a variety of skills obtained through many years of training and apprenticeship. Because of training and the safety risks associated with high voltage, Local 3 journeymen electricians command a premium wage. . . . [L]ow voltage workers do not have the same skill levels or face the risks associated with high voltage and accordingly, their compensation is lower. This enables CWA contractors who are not bound by the wage strictures of Local 3 to significantly underbid Local 3 contractors[.]

(Pl. Memo. at 8-9).

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There is a long history of jurisdictional disputes between the CWA and the IBEW, of which Local 3 is a chapter. (Def. 56.1 Stmt., ¶¶ 146-147; Pl. 56.1 Stmt., ¶¶ 146-147). According to Local 3, low-voltage electrical work has historically been the province of the IBEW. Local 3 claims that in recent years the CWA has "challenge[d] the IBEW for this work, often succeeding in obtaining it, ousting the IBEW electricians and performing the work at pay rates that were, and still are, substandard by any relevant criteria."[4] (Affidavit of Thomas Van Arsdale dated Aug. 23, 2005 ("Van Arsdale Aff."), ¶ 19). Although the IBEW and the CWA signed a treaty designed to resolve the dispute between the two unions (Affidavit of Morton Bahr dated March 27, 2007 ("Bahr Aff."), attached as Exh. 33 to Declaration of John E. Andrews dated April 2, 2007 ("Andrews Decl."), ¶ 13; Van Arsdale Aff., ¶ 21), the plaintiffs claim that Local 3 has tried to "exclude non-Local 3 labor" from the industry. (Pl. Memo. at 34-40). This case involves the plaintiffs' claim that Local 3 has enlisted the aid of electrical contractors in an attempt to force CWA contractors out of the telecommunications installation market.

B. *Plaintiffs' Claims*

The plaintiffs contend that Local 3 has conspired with the defendant contractors "to coerce and induce

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4. The plaintiffs, by contrast, contend that "[i]n the early days of telecommunications, installations were done only by the telephone company monopolies utilizing CWA labor." (Pl. Memo. at 8).

building owners and tenants, building managers, general contractors, information technology consultants, and others in the construction industry to exclude the plaintiffs from the market for telecommunications installation work." (Second Complaint dated Feb. 22, 2002 ("Sec. Compl."), ¶ 36). According to the plaintiffs, CWA contractors have been able to capture a substantial portion of the New York low-voltage installation market in recent years by submitting lower bids than Local 3 contractors, in part because, as explained above, their labor costs are lower. (Pl. Memo. at 9). The plaintiffs contend that the defendants, afraid that they would lose tel-data work to lower-priced CWA contractors,

> have resorted to measures that allow them to win bids for low voltage projects without lowering their price, specifically, their tried and true tactic of creating fear among owners, consultants and general contractors that completion deadlines will be missed, sabotage and vandalism will occur and significant costs [will be] incurred if a CWA contractor is awarded the job.

(Pl. Memo. at 7). They assert that the defendants' "key tactic" consists of "threats communicated to potential customers or their agents that Local 3 workers employed by the defendant contractors to do the high voltage electric work would take measures to cause scheduling delays resulting in cost overruns if a non-Local 3 contractor was chosen to perform the

telecommunications work on a particular project." (Pl. Memo. at 1). The plaintiffs also contend that, in some instances, Local 3 members disrupted work when teldata contracts were awarded to CWA contractors and that, as a result, those contracts were rescinded and awarded to Local 3 contractors instead. (Pl. Memo. at 2).

C. *Plaintiffs' Evidence*

1. *A R Communication Contractors Inc.*

Defendant A R Communication Contractors Inc. ("A R") performs only low-voltage telecommunications work. (Def. 56.1 Stmt., P 166; Pl. 56.1 Stmt., ¶ 166). However, it uses Local 3 labor. The plaintiffs have submitted an affidavit from Terence McDonough, the president of plaintiff Odyssey Group, Inc. ("Odyssey"), in which he states that Odyssey bid on "turret installation work" on the "ABN Amro project" at 1290 Avenue of the Americas. (Affidavit of Terence McDonough dated Dec. 8, 2000 ("McDonough Aff."), attached as Exh. 64 to Andrews Decl., ¶ 5). Odyssey submitted the bid to Syntegra, another contractor that had been "awarded the contract for the sale of turret equipment." (McDonough Aff., ¶ 5). Mr. McDonough states that "a Syntegra official informed [him] that a business agent of IBEW Local No. 3 had threatened ABN Amro that the project would not be completed on time unless IBEW Local No. 3 labor was used for all of the telecommunications installation work on the project." (McDonough Aff., ¶ 5). The turret installation work was

then awarded to A R allegedly "because of the 'Local 3 issue.'" (McDonough Aff., ¶ 5).

2. *ADCO*

The only evidence related to defendant ADCO involves the NBC Experience project at 30 Rockefeller Plaza. (Def. 56.1 Stmt., ¶¶ 196-197; Pl. 56.1 Stmt., ¶¶ 196-197). NBC hired plaintiff U.S. Information Systems ("USIS") to do the telecommunications installation work. (Affidavit of Stan Walczak dated April 15, 1999 ("Walczak Aff."), attached as Exh. 56 to Andrews Decl., ¶ 7). USIS began work in February 1999. (Walczak Aff., ¶ 8). At that time, ADCO had already been working on the NBC project for four or five months. (Excerpts of Deposition of Stanley Walczak dated Aug. 2, 2002 ("Walczak Dep."), attached as Exh. 30 to Andrews Decl. and Exh. 47 to Declaration of Kevin J. Toner dated Feb. 16, 2007 ("Toner Decl."), at 32; Walczak Aff., ¶ 4). During those months, ADCO electricians regularly worked overtime as needed to "[s]upport other trades and stay on schedule."[5] (Walczak Dep. at 32; Walczak Aff., ¶ 4).

On February 1, when CWA members arrived on the job site, an ADCO foreman complained to ADCO project manager Tom Conte and to Stan Walczak, a Senior Project Manager in the NBC Facilities Department, that

5. In many cases, construction projects are placed on an accelerated schedule, and contractors must use overtime labor in order to complete the project on time. (Def. 56.1 Stmt., ¶ 8; Pl. 56.1 Stmt., ¶ 8).

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"USIS' employees were performing work that was not within the jurisdiction of the CWA, but rather, within the jurisdiction of Local 3 employees." (Walczak Aff., ¶ 9; Excerpts of Deposition of Thomas Conte, attached as Exh. 20 to Toner Decl., at 95). The foreman allegedly informed Mr. Walczak that "Local 3 employees . . . would not work overtime and would engage in work slowdowns as long as USIS' employees continued performing the telecommunications work in question." (Walczak Aff., ¶ 9). On that day, ADCO electricians worked half an hour before and after the standard workday in order to supply power and light for other tradespeople working at the site, but performed no additional overtime. (Def. 56.1 Stmt., ¶ 198; Pl. 56.1 Stmt., ¶ 198).

On February 2, 1999, ADCO transferred six of the electricians who had refused to perform overtime to another project. (Def. 56.1 Stmt., ¶ 199; Pl. 56.1 Stmt., ¶ 199). Despite this measure, ADCO workers continued to refuse to work overtime; according to the plaintiffs, all of the ADCO electricians left the job site at approximately 3:15 p.m. for the next week to ten days. (Walczak Dep. at 42, 75; Walczak Aff., ¶ 11; Affidavit of Thomas Yuen dated April 9, 1999 ("Yuen Aff."), attached as Exh. 53 to Andrews Decl., ¶ 9). NBC replaced USIS with ADCO for the telecommunications work, and the work slowdowns ceased. (Walczak Aff., ¶¶ 12, 14; Letter of Frank Lazzaro dated Feb. 18, 1999, attached as Exh. 57 to Andrews Decl.). ADCO did not directly request that NBC terminate the USIS contract; NBC did so because ADCO employees' refusal to work overtime jeopardized the construction schedule. (Walczak Dep.

at 79, 99, 100). ADCO agreed to "do the balance of the work for the same price as USIS." (Walczak Dep. at 45-46, 82; E-mail of Stan Walczak dated Feb. 8, 1999, attached as Exh. 55 to Andrews Decl.).

3. *Five Star*

The evidence against Five Star involves the Hotel Sofitel project. After USIS was awarded the telecommunications installation contract on the project, Five Star employees allegedly shut down elevators and refused to supply power to the construction site on a number of occasions, apparently at the direction of Howie Tensor, the Five Star foreman. (Excerpts of Deposition of Fred Lott ("Lott Dep."), attached as Exh. 15 to Andrews Decl., at 105, 109-11, 117-19, 171). In addition, Five Star's electricians refused to work overtime.[6] (Lott Dep. at 139). Fred Lott, construction manager for the building owner, testified that Mr. Tensor told him that Robert King, the Five Star project manager, had directed him not to supply power or bring workers to the job site until the issue with USIS had been resolved. (Lott Dep. at 104-08). However, Mr. Lott also testified that other representatives of Five Star told him that the problem was that Local 3 had refused to provide the company with overtime labor because the

6. During the same time period, telecommunications cables, light fixtures, and "bathroom speakers" disappeared from the job site. (Lott Dep. at 133-36).

telecommunications work had been given to USIS. (Lott Dep. at 108, 151-53, 326-27).[7]

Mr. King met with Mr. Tensor and Rodney Graves, the assistant superintendent, and asked them to speak to the electricians who were refusing to work overtime to see if they could "do something about it." (Excerpts of Deposition of Robert King ("King Dep."), attached as Exh. 11 to Andrews Decl., at 118). The electricians indicated to Mr. Tensor and Mr. Graves that they would not work "as long as CWA is present." (King Dep. at 120; Meeting Notes dated Nov. 29, 1999, attached as Exh. 57 to Andrews Decl.; Excerpts of Deposition of John Lagana ("Lagana Dep."), attached as Exh. 12 to Andrews Decl., at 1142). At a meeting held to discuss the issue, Mr. Graves "assured [Mr. Lott and others] that Local 3 would be sure that the project was not completed if the work was not taken away from USIS," and he made references to elevator cables being cut,

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7. After these problems began, the vice-president of Lehrer McGovern Bovis ("LMB"), the general contractor on the project, wrote to Arthur Blee of Constructa, Inc. ("Constructa"), a representative of the building owner, stating that "LMB verbally advised Constructa . . . on numerous occasions that it would not be wise to award this contract to a non-Local 3 contractor." The letter lists a number of problems encountered as a result of the decision to use CWA labor, including the refusal of Local 3 electricians to perform overtime when asked, and states that "there is no way that LMB can force the men to work if they don't want to." (Letter of Harold Lyons dated Nov. 29, 1999 ("Lyons Letter"), attached as Exh. 58 to Andrews Decl.).

things going missing, and people refusing to work. (Lott Dep. at 139-40). Mr. Lott interpreted this as a threat and also felt that Mr. Graves was threatening him personally. (Lott Dep. at 139-42, 160-61, 187). According to Mr. Lott, Mr. King "tried to quiet Mr. Graves down" during this meeting. (Lott Dep. at 142). Eventually, after discussing the matter with Thomas Van Arsdale, business manager of Local 3, Mr. King removed Mr. Graves from the project because "that was not the way that [Mr. King] chose to do business." (Lott Dep. at 155, 332).

At a meeting with representatives of the building owner, LMB indicated that if USIS and Five Star were to continue working on the project together, "concessions would have to be made to [Local 3]." (Lott Dep. at 180). The parties at that meeting discussed the possibility of making a contribution to the Local 3 retirement fund and giving the "wire pull" portion of the telecommunications contract to Five Star and the "terminations" portion to USIS. (Lott Dep. at 180-83, 281). An e-mail from Keith Fordsman, a project manager for Constructa, states that Local 3 believed that a specific task that had been assigned to USIS was a "Local 3 work task" and that he had "negotiated a middle ground with Local 3." (E-mail of Keith Fordsman dated June 13, 2000, attached as Exh. 58 to Andrews Decl.). It is not clear what that "middle ground" entailed, but it appears that Five Star did ultimately perform some part of the telecommunications installation work on the project. (Lott Dep. at 294, 312-13).

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4. *Hugh O'Kane*

The evidence against defenant Hugh O'Kane involves a project for Qwest Communications International, Inc. ("Qwest") at 32 Avenue of the Americas. Although Hugh O'Kane was initially hired as the telecommunications contractor on that project, Qwest replaced the company with plaintiff Blue Diamond Fiber Optic Networks, Inc. ("Blue Diamond") because of problems with Hugh O'Kane's performance. (Declaration of Patrick Marshall dated Aug. 20, 2002 ("Marshall Decl."), attached as Exh. 40 to Andrews Decl., ¶ 5). After the change, Patrick Marshall, the Northeast Region Splice Coordinator for Qwest, did a "walk-through" of the building with several Blue Diamond employees and sub-contractors. During this walk-through, he was informed by the Qwest project manager that the Local 3 shop steward employed by Hugh O'Kane had "threatened that there would be trouble in the building if Blue Diamond were permitted to perform any work at this location." (Marshall Decl., ¶¶ 6-7). Before Blue Diamond started working on the project, "Local 3 members began slowing work down at 32 Avenue of the Americas and at other Qwest projects all over Manhattan" by calling in sick or refusing to work overtime. (Marshall Decl., ¶ 8; Excerpts of Deposition of Richard Mullarkey ("Mullarkey Dep."), attached as Exh. 36 to Toner Decl., at 185). As a result, the telecommunications work on the Qwest project was reassigned to Hugh O'Kane. (Marshall Decl., ¶ 11). After that, the problems with Local 3 members promptly ceased. (Marshall Decl., ¶ 12).

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5. *Nead Information Systems, Inc.*

Nead Information Systems ("NIS") is a telecommunications contractor, while Nead Electric is an electrical contractor, and both employ Local 3 members. Only NIS is a defendant in this case. The parties dispute whether NIS can be held liable with respect to projects that involved only Nead Electric. (Def. 56.1 Stmt., ¶¶ 356-365; Pl. 56.1 Stmt., ¶¶ 356-365; Joint Memorandum of Law in Support of Defendants' Motion for Summary Judgment ("Joint Def. Memo.") at 19).

a. *Agency.com*

Both NIS and Nead Electric may have bid on a project for Agency.com (Excerpts of Deposition of Liz Pastore ("Pastore Dep."), attached as Exh. 21 to Andrews Decl. and as Exh. 38 to Toner Decl., at 46), but only Nead Electric actually performed work on the project. (Def. 56.1 Stmt., ¶¶ 371-372). At some point, Structure Tone, the general contractor, told Liz Pastore, facilities manager for Agency.com, that she should "use Local 3 for cabling," but did not specifically reference Nead. (Pastore Dep. at 39, 190). Agency.com nevertheless awarded the telecommunications contract to USIS. (Lagana Dep. at 944; Pastore Dep. at 86). After USIS workers arrived on the job, almost all of the Nead electricians already working on the project refused to work overtime, causing the project to run behind

schedule.[8] (Lagana Dep. at 944-45; Pastore Dep. at 63, 65-68, 169). Nead put more men on the project during the day to make up for the lack of workers willing to work overtime. (Pastore Dep. at 194). Structure Tone told Ms. Pastore that these problems were a result of the fact that she had hired a non-Local 3 contractor. (Pastore Dep. at 121, 134, 218).

b. *Random House (280 Park Avenue)*

The only evidence that relates to the project for Random House is the testimony of Peter Babigian of Walsh-Lowe, an IT consulting firm, that at a meeting with Random House representatives, the general contractor directed Walsh-Lowe to limit bidding for the telecommunications installation at 299 Park Avenue and 280 Park Avenue to Local 3 contractors. (Excerpts of Deposition of Peter Babigian, attached as Exh. 1 to Andrews Decl., at 248-49, 411). It does not appear that NIS received the telecommunications contract, although Nead Electric performed the electrical installation. (Declaration of Robert Eccles dated Aug. 26, 2005, attached as Exh. 123 to Toner Decl., ¶ 19; Declaration of Dana Reed dated Aug. 26, 2005, attached as Exh. 128 to Toner Decl., ¶ 17).

8. Telecommunications cables at the construction site were also cut on several occasions. (Pastore Dep. at 42, 47-48).

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c. *Shearman & Sterling (850 Third Avenue)*

On a project for the law firm of Shearman & Sterling, Nead Electric performed the electrical contracting work and NIS performed the tel-data work. (Def. 56.1 Stmt., ¶ 382; Pl. 56.1 Stmt., ¶ 382). Michael Yee, director of New York operations for Shearman & Sterling, testified that the firm's landlord at 850 Third Avenue had a list of preferred vendors. Nead Electric was the landlord's favored electrical contractor. (Excerpts of Deposition of Michael Yee ("Yee Dep."), attached as Exh. 48 to Toner Decl. and as Exh. 31 to Andrews Decl., at 25-26). Although the landlord required tenants to allow preferred contractors to bid on projects, it did not require tenants to hire those contractors if their bids were not the lowest. (Yee Dep. at 32). While the landlord did not have a preferred telecommunications vendor, it did require the firm to hire a Local 3 contractor for the telecommunications work in order to "avoid labor issues." (Yee Dep. at 22-23, 32, 35). Shearman & Sterling was prepared to "try to talk the landlord out of this requirement" if the lowest bid from a Local 3 contractor was significantly higher than the lowest bid from a non-Local 3 contractor. (Yee Dep. at 36-37).

At some point after the bids came in, the landlord asked Mr. Yee to award both the electrical and the telecommunications contracts to Nead. (Yee Dep. at 43). The landlord's representative indicated that the landlord preferred that Nead do the telecommunications

work because, as the house vendor, "they were familiar with the building systems." (Yee Dep. at 44). He did not mention possible labor unrest or delays. (Yee Dep. at 45). Shearman & Sterling then gave Nead an opportunity to match the lowest bids for both electrical and telecommunications installation, and the firm subsequently chose to hire both Nead Electric and NIS. (Yee Dep. at 58, 63-64, 186).

Russell Ramey, a Shearman & Sterling employee involved in supervising the project, testified that Mark Kanyuk, a technical specialist for the firm, told him that Shearman & Sterling "wouldn't be able to use the freight elevator unless Local 3 was doing the data work." (Excerpts of Deposition of Russell W. Ramey ("Ramey Dep."), attached as Exh. 23 to Andrews Decl., at 99). It is unclear where Mr. Kanyuk got this information. Mr. Ramey also testified that he felt pressure from "the building" (presumably meaning the landlord) and from the general contractor to hire Nead although it was not the lowest qualified bidder. (Ramey Dep. at 102-03, 107-08, 199-200). He testified that Mr. Kanyuk and another Shearman & Sterling employee informed him that the general contractor made statements indicating that "he had been pressured to behave in certain ways, or to give contracts to certain people," but could not say who had put pressure on the general contractor. (Ramey Dep. at 200).

Appendix C

Discussion

A. *Summary Judgment Standard*

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, summary judgment is appropriate where the evidence offered demonstrates "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also Tocker v. Philip Morris Companies, Inc.*, 470 F.3d 481, 486-87 (2d Cir. 2006); *Andy Warhol Foundation for the Visual Arts, Inc. v. Federal Insurance Co.*, 189 F.3d 208, 214 (2d Cir. 1999). The moving party bears the initial burden of demonstrating "the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). Where the moving party meets that burden, the opposing party must come forward with "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). "[A]ll inferences must be drawn in favor of the non-moving party." *Apex Oil Co. v. DiMauro*, 822 F.2d 246, 252 (2d Cir. 1987) (internal citations and quotation marks omitted).

However, "to defeat a motion for summary judgment [the non-moving party] cannot rely on conjecture or surmise, and must do more than simply show that there is some metaphysical doubt as to the material facts." *Heilweil v. Mount Sinai Hospital*, 32 F.3d 718, 723 (2d Cir. 1994) (internal quotation marks and citations omitted). If the court determines that "the record taken as a whole could not lead a rational trier of fact to find

for the non-moving party, there is no genuine issue for trial." *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986) (citing *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 289, 88 S. Ct. 1575, 20 L. Ed. 2d 569 (1968)) (internal quotation marks omitted).

B. *Non-Statutory Labor Exemption*

The defendants contend that, even assuming that there was an agreement between the defendant contractors and Local 3 as alleged by the plaintiffs, that agreement is beyond the reach of the federal antitrust laws because it is subject to the non-statutory labor exemption. The Second Circuit has found that the "classic formulation" of the non-statutory labor exemption is as follows:

> agreements between a union and an employer are exempt from antitrust scrutiny if they are "so intimately related to wages, hours and working conditions that the unions' successful attempt to obtain that provision through bona fide, arm's-length bargaining in pursuit of their own labor union policies, and not at the behest of or in combination with nonlabor groups, falls within the protection of the national labor policy and therefore is exempt from the Sherman Act."

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Local 210, Laborers' International Union v. Labor Relations Division Associated General Contracting, 844 F.2d 69, 79 (2d Cir. 1988) (quoting *Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 689-90, 85 S. Ct. 1596, 14 L. Ed. 2d 640 (1965) (plurality opinion)); *accord Clarett v. NFL*, 369 F.3d 124, 132 n.12 (2d Cir. 2004); *Berman Enterprises Inc. v. Local 333, United Marine Division, International Longshoremen's Association*, 644 F.2d 930, 935 n.8 (2d Cir. 1981).[9]

The Supreme Court has noted that, "[a]s a matter of logic, it would be difficult, if not impossible, to require . . . employers and employees to bargain together, but at the same time forbid them to make . . . *any* of the competition-restricting agreements potentially necessary to make the process work or its results mutually acceptable." *Brown v. Pro Football, Inc.*, 518 U.S. 231, 237, 116 S. Ct. 2116, 135 L. Ed. 2d 521 (1996).

Union success in organizing workers and standardizing wages ultimately will affect

9. The statutory labor exemptions contained in the Clayton Act, *see* 15 U.S.C. § 17; 29 U.S.C. § 52, and the Norris-LaGuardia Act, *see* 29 U.S.C. §§ 104, 105, 113, "exempt certain union activities from antitrust scrutiny." *Local 210*, 844 F.2d at 79. The statutory labor exemptions "do not . . . reach concerted activity between a union and a nonlabor party, such as an employer." *Id.* (citations omitted). Accordingly, they are inapplicable here. *See U.S. Info. Sys. v. IBEW Local Union No. 3*, No. 00 Civ. 4763, 2002 U.S. Dist. LEXIS 1038, 2002 WL 91625, at *2 (S.D.N.Y. Jan. 23, 2002).

> price competition among employers, but the goals of federal labor law never could be achieved if this effect on business competition were held a violation of the antitrust laws. . . . Labor policy clearly does not require, however, that a union have freedom to impose direct restraints on competition among those who employ its members. Thus, while the statutory exemption allows unions to accomplish some restraints by acting unilaterally, . . . the nonstatutory exemption offers no similar protection when a union and nonlabor party agree to restrain competition in a business market.

Connell Construction Co. v. Plumbers and Steamfitters Local Union No. 100, 421 U.S. 616, 622-23, 95 S. Ct. 1830, 44 L. Ed. 2d 418 (1975) (internal citations omitted); *see also Allen Bradley Co. v. Local Union No. 3, International Brotherhood of Electrical Workers*, 325 U.S. 797, 808, 65 S. Ct. 1533, 89 L. Ed. 1939 (1945) ("Congress never intended that unions could, consistently with the Sherman Act, aid non-labor groups to create business monopolies and to control the marketing of goods and services.").

The purpose of the non-statutory exemption is "to prevent intrusion upon the collective bargaining process." *U.S. Info. Sys.*, 2002 U.S. Dist. LEXIS 1038, 2002 WL 91625, at *3. However, the exemption does not apply only "to understandings embodied in a collective-bargaining agreement — for the collective-bargaining

process may take place before the making of any agreement or after an agreement has expired." *Brown*, 518 U.S. at 243. Rather, the exemption applies "where needed to make the collective-bargaining process work." *Id.* at 234.

The defendants contend that, even assuming there was an agreement between Local 3 and the defendant contractors, such an agreement is exempt from antitrust scrutiny because it arose "in the context of collective bargaining." (Joint Def. Memo. at 42). The Court rejected this claim when it denied the defendants' motion to dismiss. *See U.S. Info. Sys.*, 2002 U.S. Dist. LEXIS 1038, 2002 WL 91625, at *3. In the present motion, the defendants assert that the collective bargaining agreement between Local 3 and the contractors' associations to which the defendant contractors belong, which the Court may consider on summary judgment, makes it clear that the exemption is applicable here. (Joint Def. Memo. at 42). The defendants maintain that Article III of the collective bargaining agreement gives members of Local 3 the right to refuse overtime,[10] while

10. Article III, Rule 3(m) states that the foreman must call the union to ask for permission for the electricians to work overtime. (Agreement and Working Rules between New York Electrical Contractors Association, Inc., Association of Electrical Contractors, Inc., and Local 3 ("CBA"), attached as Exh. 114 to Toner Decl. and as Exh. 50 to Andrews Decl., Art. III, Rule 3(m)). Rule 5 states that overtime is not permitted except in emergencies and that members may not work overtime without permission from the Local 3 Business (Cont'd)

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Article VIII forbids members to disrupt work when there are jurisdictional disputes with other unions.[11] (Memorandum of Law on Behalf of Defendant Local 3 in Support of the Motion for Summary Judgment ("Local 3 Memo.") at 15-16). The defendants claim that because the collective bargaining agreement contains these provisions, any "communications" between Local 3 and the defendant contractors regarding job site vandalism or workers' refusal to work overtime are protected by the non-statutory labor exemption. (Local 3 Memo. at 16-17). This argument is utterly lacking in merit. The agreement alleged by the plaintiffs is not one reached by an employer and a union in the course of collective bargaining. The fact that the collective bargaining agreement addresses work stoppages and overtime does not mean that a conspiracy between Local 3 and the defendant contractors to use or threaten to use such tactics in order to exclude CWA contractors

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Manager's Office. (CBA, Rule 5). The defendants note that "[t]here is no clause in the CBA which obliges an individual worker to work any overtime at all." (Affidavit of Joseph D'Angelo dated Aug. 24, 2005, attached as Exh. 122 to Toner Decl., ¶ 4). However, Thomas Carino, Sr. formerly the Chief Operating Officer of IPC, testified that under the collective bargaining agreement, workers do not have the right to refuse to work overtime if the contractor requests it. (Excerpts of Deposition of Thomas Carino, Sr., attached as Exh. 3 to Andrews Decl., at 195-97).

11. Article VII states in part that "[t]here will be no strikes, no work stoppages or slow down[s] or other interferences with the work because of jurisdictional disputes." (CBA, Art. VIII).

from the tel-data installation market is somehow embodied in the collective bargaining agreement. Nor is the alleged agreement in any way "needed to make the collective bargaining process work." *Brown*, 518 U.S. at 234. Consequently, subjecting the defendants' actions to antitrust scrutiny does not risk intruding upon the collective bargaining process.[12]

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12. The defendants also claim that the alleged agreement between the defendants would be subject to the "construction industry proviso" of § 8(e) of the National Labor Relations Act (the "NLRA"), 29 U.S.C. § 158(e). That provision exempts certain aspects of the construction industry from the NLRA's ban on so-called "hot cargo clauses" in collective bargaining agreements. *Local 210*, 844 F.2d at 72-73. A "hot cargo clause" is an agreement by an employer, at the union's behest, "to boycott the goods or services of other employers that did not comply with union standards or recognize a union." *Id.* at 72 (citations omitted). The alleged conspiracy at issue here does not involve such an agreement, and therefore does not appear to fall within the scope of the proviso. However, even assuming that it does, the proviso protects employers and unions within the construction industry only from scrutiny under § 8(e) of the NLRA. In order to be exempt from antitrust scrutiny, an agreement that is subject to the construction industry proviso must also fall within the scope of "'one of two recognized labor law exemptions from antitrust scrutiny — the statutory and non-statutory exemptions.'" *Drywall Tapers & Pointers, Local Union Local 1974 v. Bovis Lend Lease Interiors, Inc.*, No. 05 Civ. 2746, 2005 U.S. Dist. LEXIS 19632, 2005 WL 2205836, at *15 (E.D.N.Y. Sept. 9, 2005) (quoting *Local 210*, 844 F.2d at 79). As explained above, neither of these exemptions applies here.

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D. *Sherman Act*

1. *Elements of § 1 Claim*

Section 1 of the Sherman Act provides that "every contract, combination, in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal." 15 U.S.C. § 1. To establish a § 1 violation, the plaintiffs must produce evidence sufficient to show: (1) a combination or some form of concerted action between at least two legally distinct economic entities; and (2) that such combination or conduct constituted an unreasonable restraint of trade either *per se* or under the "rule of reason."[13] *U.S. Info. Sys.*,

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13. "Conduct considered illegal *per se* is invoked only in a limited class of cases where a defendant's actions are so plainly harmful to competition and so obviously lacking in any redeeming pro-competitive values that they are 'conclusively presumed illegal without further examination.'" *Capital Imaging Associates, P.C. v. Mohawk Valley Medical Associates, Inc.*, 996 F.2d 537, 542 (2d Cir. 1993) (quoting *Broadcast Music, Inc. v. CBS*, 441 U.S. 1, 8, 99 S. Ct. 1551, 60 L. Ed. 2d 1 (1979)); *see also Leegin Creative Leather Prods. v. PSKS, Inc.*, __ U.S. __, __, 127 S. Ct. 2705, 2713, 168 L. Ed. 2d 623 (2007) (explaining that *per se* rule is limited to restraints "that would always or almost always tend to restrict competition and decrease output" (quoting *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 723, 108 S. Ct. 1515, 99 L. Ed. 2d 808 (1988)). "Most antitrust claims . . . are analyzed under a 'rule of reason' analysis which seeks to determine if the alleged restraint is unreasonable because its 'anti[-]competitive effects outweigh

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2002 U.S. Dist. LEXIS 1038, 2002 WL 91625, at *4 (citing *Tops Mkts., Inc. v. Quality Mkts., Inc.*, 142 F.3d 90, 95-96 (2d Cir. 1998)). In addition, the plaintiffs must establish that they have "antitrust standing" and that they have suffered "antitrust injury."[14] *Atlantic Richfield*, 495 U.S. at 334; *National Camp Ass'n v. American Camping Ass'n*, No. 99 Civ. 11853, 2000 U.S. Dist. LEXIS 18194, 2000 WL 1844764, at *3 (S.D.N.Y. Dec. 15, 2000).

2. *Conspiracy*

a. *Legal Standard*

"Independent actions taken by an entity fall outside the purview of § 1." *Virgin Atlantic Airways Ltd. v. British Airways PLC*, 257 F.3d 256, 263 (2d Cir. 2001); *accord Capital Imaging Associates*, 996 F.2d at 542. To prevail on their § 1 claim, therefore, the plaintiffs must

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its pro[-]competitive effects.'" *E & L Consulting, Ltd. v. Doman Industries Ltd.*, 472 F.3d 23, 29 (2d Cir. 2006) (quoting *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 342, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990)).

14. The plaintiffs must also "adequately . . . define the relevant product market." *Rock TV Entertainment, Inc. v. Time Warner, Inc.*, No. 97 Civ. 0161, 1998 U.S. Dist. LEXIS 799, 1998 WL 37498, at *2 (S.D.N.Y. Jan. 30, 1998) (quotations and citation omitted). However, the defendants have stated that they "are not challenging the 'relevant market' for purposes of this motion." (Joint Def. Memo. at 4 n.4).

demonstrate that the defendants conspired together, meaning that they "were consciously committed 'to a common scheme designed to achieve an unlawful objective.'" *Virgin Atlantic*, 257 F.3d at 263 (quoting *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 768, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984)); *see also Bell Atl. Corp. v. Twombly*, __ U.S. __, __, 127 S. Ct. 1955, 1964, 167 L. Ed. 2d 929 (2007) ("[T]he crucial question is whether the challenged anticompetitive conduct stems from independent decision or from an agreement, tacit or express." (internal quotation marks and citation omitted)). In order to survive a motion for summary judgment, it is "critical" that the plaintiff make a threshold showing that "a reasonable jury could find that the defendants' actions were concerted rather than independent." *AD/SAT, Division of Skylight, Inc. v. Associated Press*, 181 F.3d 216, 233 (2d Cir. 1999).

A threshold showing may be made using circumstantial evidence alone, since "direct proof of an illegal agreement is rarely available." *Building Indus. Fund v. Local Union No. 3, IBEW*, 992 F. Supp. 162, 181 (E.D.N.Y. 1996); *see also Venture Technology, Inc. v. National Fuel Gas Co.*, 685 F.2d 41, 45 (2d Cir. 1982) ("Illegal conspiracies, of course, can rarely be proved through evidence of explicit agreement, but must generally be proved through inferences from the conduct of the alleged conspirators." (citing *Michelman v. Clark-Schwebel Fiber Glass Corp.*, 534 F.2d 1036, 1043 (2d Cir. 1976))). However, "antitrust law limits the range of permissible inferences from ambiguous evidence." *Matsushita*, 475 U.S. at 588. "[C]onduct as consistent

with permissible conduct as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Id.* (citing *Monsanto*, 465 U.S. at 764). In order to prevail on a motion for summary judgment, a plaintiff must therefore "present evidence that 'tends to exclude the possibility that the alleged conspirators acted independently.'" *Reading Int'l, Inc. v. Oaktree Capital Mgmt. LLC*, No. 03 Civ. 1895, 2007 U.S. Dist. LEXIS 504, 2007 WL 39301, at *7 (S.D.N.Y. Jan. 8, 2007) (quoting *Matsushita*, 475 U.S. at 588).

> [T]he Second Circuit has . . . stressed that where competing versions of the facts are equally plausible, the case should not be decided by a jury: "[w]e have overturned jury verdicts where, taken as a whole, the evidence point[ed] with at least as much force toward unilateral actions by [the defendants] as toward conspiracy, and a jury would have to engage in impermissible speculation to reach the latter conclusion."

Building Indus. Fund, 992 F. Supp. at 181 (quoting *International Distribution Centers, Inc. v. Walsh Trucking Co.*, 812 F.2d 786, 794 (2d Cir. 1987) (alterations in original).

b. *Evidence of Conspiracy*

The plaintiffs first contend that while circumstantial evidence is sufficient to prove a conspiracy, in this case "the defendant[] contractors have . . . actually agreed

in writing to 'continually endeavor' to shill for Local 3 workers." (Pl. Memo. at 3). The plaintiffs maintain that Article III, Rule 2(f) of the collective bargaining agreement between the defendant contractors and Local 3 is direct proof of a conspiracy. That provision reads as follows:

> Every individual Employer agrees in addition to his regular work to solicit and perform residential, industrial and small types of work. The Employer will continually endeavor to make available and increase the volume of employment for electrical workers through salesmanship, enterprising business methods, being properly equipped to render efficient electrical services to the community, by promoting and encouraging modern installations and aiding the industry to educate the public of the need for improved electrical installations and expansion.

(CBA, Art. III, Rule 2(f)). The plaintiffs interpret this provision as an agreement by the contractors to use improper means, such as threats of work stoppages and vandalism, to force telecommunications contracts to be awarded to Local 3 contractors, thereby ensuring employment for Local 3 workers. The plaintiffs claim that this provision, when considered in conjunction with the other evidence they have submitted, "could readily be found by a jury as furthering a common purpose, and is certainly consistent with the classic conspiracy paradigm of an agreement coupled with overt acts in

furtherance of an agreement." (Pl. Memo. at 3). However, there is no reason to believe that, in this context, "enterprising business methods" means anything sinister. The remainder of the plaintiffs' evidence does not justify an inference that Article III, Rule 2(f) is anything other than what it appears to be: a promise to use whatever lawful means are available to increase the demand for Local 3 labor.

The plaintiffs also make much of a meeting between representatives of Local 3 and various electrical contractors that apparently took place in 1996 or 1997. (Pl. Memo. at 9-10). Robert Eccles, Executive Vice President of defendant Nead Information Systems, testified that he put together a list of topics for Robert Marziotto, who is affiliated with both Nead Information Systems and Nead Electric, to bring up at the meeting.[15] (Excerpts of Deposition of Robert Eccles ("Eccles Dep."), attached as Exh. 8 to Andrews Decl., at 122-23). The first topic on the list reads: "CWA problem with respect to comp[et]ition s[c]enario, procedure when threatened by CWA and future of telecommunications with Local 3?" ("Topics for Meeting w/ Local Three," attached as Exh. 54 to Andrews Decl.). Mr. Eccles testified that he was referring to the possibility of

15. The plaintiffs contend that the meeting was held specifically to discuss the issue of jobs lost to CWA contractors, but there is no evidence to that effect. Nor is there any direct evidence that any of the defendant contractors besides NIS attended the meeting. (*See* Eccles Dep. at 122-26, 132, 139; Excerpts of Deposition of Raymond A. Melville, attached as Exh. 20 to Andrews Decl., at 164-65).

implementing a different wage scale for workers who performed tel-data work, as opposed to high voltage work, so that Local 3 contractors would be better able to compete for telecommunications contracts:

> A. Can I go back and give this candidate labor rates, are they going to offer H rates again. . . . What do I do. What's my procedure. Since you don't have a dialogue with them and you —
>
> Q. With Local 3?
>
> A. — there's no open communication. Is there something they can tell me to do to try and go and compete. Give me some direction that's real, that I can go to the client and say, I'll offer a great proposal, this wonderful proposal at a great number, and we can go win the work.

(Eccles Dep. at 125-26, 139).[16]

16. In September 1998, Mr. Eccles himself met with a representative of Local 3 to discuss the fact that Nead was losing telecommunications bids to CWA contractors. (Eccles Dep. at 108). In a letter to Mark Hansen, a business agent for Local 3, Mr. Eccles stated, "We are losing as much work to CWA as we are winning now and [it is] getting worse." (Letter of Robert Eccles dated Sept. 1, 1998 ("Eccles Letter"), attached as Exh. 54 to Andrews Decl.). Mr. Eccles sought a meeting with Mr. Hansen "to discuss this problem and review any (Cont'd)

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The plaintiffs offer no evidence that representatives of Local 3 and the defendant contractors discussed the possibility of winning contracts by threatening to engage in vandalism or withhold overtime at that meeting or at any other time.[17] The plaintiffs themselves assert that Local 3 contractors were regularly losing telecommunications bids to CWA contractors during this time period because the higher wages commanded by Local 3 electricians made it difficult to compete. (Pl. Memo. at 8-9). It is hardly surprising that contractors employing Local 3 electricians would discuss the issue with union representatives. The evidence submitted by the plaintiffs, even when taken as a whole, does not justify an inference that the list of topics for discussion drafted by Mr. Eccles was anything other than an attempt to start a discussion with Local 3 regarding the possibility of wage concessions or other legitimate ways to increase the competitiveness of Local 3 contractors in the telecommunications market.

The plaintiffs also rely heavily on evidence of the perceptions of customers and general contractors,

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recommendations you may have to competing in this marketplace [sic]." (Eccles Letter). Mr. Eccles eventually met with Howard Cohen of Local 3, but according to Mr. Eccles, Mr. Cohen "listened intently and nothing happened." (Eccles Dep. at 108).

17. Indeed, there is no evidence that the representatives at the meeting discussed Nead's list of concerns at all; Mr. Eccles testified that he did not think that Mr. Marziotto "ever got a chance to speak" at the meeting. (Eccles Dep. at 126).

asserting that their "proof consists not only of evidence of specific situations where CWA's presence on the job site has led to disruptive acts by Local 3 . . . but more importantly, evidence of the state of mind fostered by the perception of the 'Local 3 problem' among those in the industry." (Pl. Memo. at 7). But even were this evidence sufficient to prove intimidation, the plaintiffs have offered little to support an inference that this "state of mind" arose as a result of the actions of anyone other than Local 3. An antitrust plaintiff cannot "rest on his allegations of a conspiracy to get to a jury without 'any significant probative evidence tending to support the complaint.'" *Anderson v. Liberty Lobby*, 477 U.S. 242, 249, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986) (quoting *First National*, 391 U.S. at 290). It is therefore necessary to examine the available evidence against each defendant contractor to determine whether the plaintiffs have put forward sufficient circumstantial evidence to permit an inference of conspiracy.

The plaintiffs have offered no evidence to support their claims that A R and NIS were part of a conspiracy. In the case of A R, there is evidence only that a business agent of Local 3 threatened an employee of a general contractor (Syntegra), as a result of which the work was awarded to A R. This does not support an inference that A R was part of the alleged conspiracy. Nor does the evidence implicate NIS in such a conspiracy, even assuming that NIS may be held responsible for actions taken by Nead Electric. On the Agency.com project, a general contractor (Structure Tone) told the owner's representative that she should hire a Local 3

telecommunications contractor. When she hired USIS, Nead Electric employees refused to work overtime. The plaintiffs have put forward no evidence to support an inference that Local 3 acted in concert with Nead Electric to force the owner to rescind its contract with USIS. Indeed, it appears that by putting more electricians to work during the regular work day, Nead Electric sought to ensure that its electricians' refusal to work overtime did not inconvenience the customer.

With respect to the Random House and Shearman & Sterling projects, the evidence reveals only that third parties (two general contractors and a building owner) required customers to use Local 3 contractors for telecommunications work. There is no evidence that they did so because they had been threatened by NIS, Nead Electric, or any other defendant contractor.[18]

With respect to the remaining defendants, there is some evidence that their employees told customers that hiring a CWA contractor would result in problems for the customer. In the case of Hugh O'Kane, there is evidence that a Local 3 shop steward stated that "there would be trouble in the building" if plaintiff Blue Diamond was awarded the contract. There is also evidence that employees of ADCO and Five Star told representatives of the building owners on two projects

18. Although Shearman & Sterling's landlord did specifically ask the firm to hire NIS, its stated reason for doing so was it would make the work more efficient because Nead Electric was the "house vendor" and therefore the company was familiar with the building.

that electricians would not work overtime because the telecommunications work had been given to USIS. However, these incidents are insufficient to permit the plaintiffs to avoid summary judgment. As explained above, an antitrust plaintiff must "present evidence that 'tends to exclude the possibility that the alleged conspirators acted independently.'" *Reading Int'l, Inc.*, 2007 U.S. Dist. LEXIS 504, 2007 WL 39301, at *7 (quoting *Matsushita*, 475 U.S. at 588). In this case, the plaintiffs have not met their burden.

To begin with, it is not clear that the employees who made the statements at issue acted with the knowledge or approval of their employers. Each of the employees was a member of Local 3, and the Hugh O'Kane employee is identified as a union shop steward. According to the construction manager, Mr. Lott, when Mr. Graves, the Five Star assistant superintendent, threatened him at a meeting, he appeared to speak on behalf of Local 3, stating that the union "would be sure that the project was not completed if the work was not taken away from USIS." (Lott Dep. at 139). Indeed, Mr. Lott testified that the Five Star project manager removed Mr. Graves from the project after his outburst.[19]

19. Nor do the plaintiffs dispute that ADCO, in an apparent attempt to avoid delays, reassigned six workers who had refused to work overtime. This kind of behavior indicates that Five Star and ADCO sought to mitigate the damage caused by their workers' actions, rather than use it as a bargaining tool to force customers to give the telecommunications contract to a Local 3 contractor.

Even assuming that the defendant contractors endorsed or condoned the statements at issue, however, it is entirely plausible that they did so in the absence of any agreement with Local 3 or with one another. Given Local 3's past actions and longstanding history of hostility toward CWA, the defendant contractors might well have been concerned that the presence of a CWA contractor on the job site would result in construction delays. Accordingly, they had an incentive to preserve their reputation by warning

> the general contractor or the customer of a possible Local 3 "problem" beyond [their] control. Suppose that the contractor using Local 3 labor had been aware of the potential for disruption and delay but did not warn the general contractor or the customer. If the disruption or delay occurred and the general contractor or customer believed that the contractor using Local 3 labor was or should have been aware of this potential, the reputation of that contractor would be diminished.

(Declaration of John R. Woodbury dated Feb. 16, 2007 ("Woodbury Decl."), ¶ 15). Furthermore, the contractor stood to benefit directly because such "warnings" increased the chances that it would be awarded telecommunications contracts.[20] (Woodbury Decl., ¶ 16).

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20. Of course, the customer might be able to avoid conflict with Local 3 electricians by hiring a *different* Local 3 contractor for the telecommunications work. But the defendant contractors

(Cont'd)

However unfair it might seem to the plaintiffs for the defendant contractors to benefit from the misbehavior of their employees, such a benefit does not violate the antitrust laws unless it was a result of concerted, rather than independent, action.

The plaintiffs insist that "[i]n a normal business setting," a contractor that told customers that its employees were going to cause scheduling delays and raise construction costs would suffer damage to its reputation and would be fired or would lose future business. (Pl. Memo. at 4-5; Sec. Compl., ¶ 40). They maintain that such behavior would only be rational in the context of the alleged conspiracy. According to the plaintiffs, the defendant contractors could afford to let customers know that they could not control their employees because they knew that "all other Local 3 contractors would deliver the same message" and that the customer therefore had no real choice. (Pl. Memo. at 4).

(Cont'd)
could reasonably assume that since they were already on the job and could begin right away, the customer would be reasonably likely to choose them as the replacement telecommunications contractor. Indeed, Five Star, ADCO, and Hugh O'Kane were each awarded telecommunications work on the projects in question after their employees began to cause construction delays. Although the Complaint refers to "numerous instances" in which electrical contractors whose employees stopped working overtime or committed vandalism "did not seek or obtain the telecommunications installation work" (Sec. Compl., ¶ 40), the plaintiffs have put forward no admissible evidence to that effect.

However, such behavior would also be rational in the absence of a conspiracy if each defendant contractor was aware, based upon the jurisdictional dispute between CWA and Local 3, that Local 3 members would cause problems, regardless of which electrical contractor they worked for, when a CWA contractor was on site. No other electrical contractor would have a competitive advantage, since they would encounter the same difficulties with their own employees.[21] Each electrical contractor would "deliver the same message" not because they had conspired together to do so but because none of them could control Local 3's actions. In this context, the defendant contractors would run very little risk of reputational harm or loss of business by telling customers that their employees were likely to cause problems.[22]

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21. "Virtually all large commercial construction sites in the New York metropolitan area utilize only union labor" (Pl. Memo. at 6), and the vast majority of, if not all, union electricians in the New York City area are members of Local 3. (Sec. Compl., ¶ 20). Although a general contractor or building owner might be able to hire a non-unionized electrical contractor, that decision would hardly be a practical one, since it would invite protests by Local 3 and other building trades workers on the job site.

22. The plaintiffs also contend that in the absence of a conspiracy, the defendant contractors would have disciplined those workers who refused to work overtime. (Pl. Memo. at 28, 30-31). However, the defendant contractors' decision not to enforce any remedy they may have had under the collective bargaining agreement could be a rational one even in the absence of a conspiracy. For example, the contractors may have chosen not to enforce the collective bargaining agreement in order to maintain peace with Local 3.

Appendix C

The plaintiffs claim that the defendant contractors' conduct is "too consistent to be coincidental rather than coordinated among themselves and through [Local 3]." (Sec. Compl., ¶ 40). But it is equally plausible that the defendants acted in their own self-interest independent of Local 3 and of one another. In another type of case, the finder of fact might well be permitted to infer a conspiracy based upon the evidence put forward by the plaintiffs. However, "the *factual and legal context* within which each party presents its evidence . . . determines what are the *reasonable* inferences to be drawn from that evidence." *R.B. Ventures, Ltd. v. Shane*, 112 F.3d 54, 58 (2d Cir. 1997) (emphasis in original). On summary judgment, "although the court must draw the inferences in favor of the non-moving party, the permissible inferences are ultimately limited by the relevant substantive law." *Id.* Under the standard set forth by the Supreme Court in *Matsushita*, this Court cannot permit an antitrust case to go to trial where the evidence is "as consistent with permissible conduct as with illegal conspiracy." 475 U.S. at 588 (citing *Monsanto*, 465 U.S. at 764). Accordingly, summary judgment should be granted to the defendant contractors.

As explained above, unilateral conduct is outside the scope of § 1 of the Sherman Act. If Local 3 did in fact threaten building owners and general contractors and encourage its members to engage in workplace misconduct, it might well be liable for extortion. Its actions might also violate the collective bargaining agreement or constitute an unfair labor practice under the NLRA. However, Local 3's actions cannot constitute

an antitrust violation under § 1 unless the union acted in concert with others. Because the plaintiffs have not put forward sufficient evidence that the defendant contractors conspired with Local 3 to exclude them from the telecommunications installation market, their claims against Local 3 should likewise be dismissed.[23]

E. *State Law Claims*

Generally, when all federal claims are dismissed, the remaining state claims should be dismissed without prejudice. *Kolari v. New York-Presbyterian Hospital*, 455 F.3d 118, 122 (2d Cir. 2006); *In re Merrill Lynch Ltd. P'ships Litig.*, 154 F.3d 56, 61 (2d Cir. 1998). "Although this is not a mandatory rule, the Supreme Court has stated that 'in the usual case in which all federal-law claims are eliminated before trial, the balance of factors to be considered under the pendent

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23. It is therefore unnecessary to address the plaintiffs' request that I reconsider my August 1, 2006 decision insofar as it barred the plaintiffs from relying on a series of judicial and administrative decisions that document Local 3's "total job policy" of using work stoppages, violence, and vandalism to obtain tel-data installation work. (Pl. Memo. at 5 n.6, 33-43). Even assuming that the total job policy remains in effect, unilateral action by Local 3 to keep CWA out of the tel-data installation trade does not violate the Sherman Act. It is also unnecessary to address the defendants' contention that, under § 6 of the Norris-LaGuardia Act, 29 U.S.C. § 106, in order to hold Local 3 responsible for any acts by its members or officers, the plaintiffs must present "clear proof" that the union participated in, authorized, or ratified the alleged act. (Joint Def. Memo. at 12-13; Local 3 Memo. at 8-9).

jurisdiction doctrine — judicial economy, convenience, fairness and comity — will point toward declining jurisdiction over the remaining state-law claims.'" *Merrill Lynch*, 154 F.3d at 61 (quoting *Carnegie-Mellon University v. Cohill*, 484 U.S. 343, 350 n.7, 108 S. Ct. 614, 98 L. Ed. 2d 720 (1988)); *see also Kolari*, 455 F3d at 122.

Here, the plaintiffs allege that the defendants' conduct violated § 340 of the New York General Business Law, known as the Donnelly Act. That statute renders illegal any contract, arrangement, or agreement that restrains competition in any business. *Great Atlantic & Pacific Tea Co. v. Town of East Hampton*, 997 F. Supp. 340, 352 (E.D.N.Y. 1998). It "is patterned after the Sherman Anti-Trust Act . . . and is generally construed in light of federal precedent." *Id.*; *accord Re-Alco Industries, Inc. v. National Center for Health Education, Inc.*, 812 F. Supp. 387, 393 (S.D.N.Y. 1993). Thus, "[l]ike § 1 of the Sherman Act, § 340 prohibits only concerted action." *Harlem River Consumers Cooperative, Inc. v. Associated Grocers of Harlem, Inc.*, 408 F. Supp. 1251, 1283 (S.D.N.Y. 1976); *see also Reading International*, 317 F. Supp. 2d at 332-33 ("Under New York law, the state and federal antitrust statutes require identical basic elements of proof." (internal quotation marks and citation omitted)).

However, it is not clear that the heightened standard for demonstrating an antitrust conspiracy that governs claims under § 1 of the Sherman Act also applies to the Donnelly Act. The parties have not identified a case from

the New York state courts that establishes such a principle, and I have found none.[24] It is therefore prudent to dismiss the Donnelly claims without prejudice. *See Gonzalez v. St. Margaret's House Housing Development Fund Corp.*, 880 F.2d 1514, 1520 (2d Cir. 1989) (if federal antitrust claims dismissed, court has discretion to decline jurisdiction over Donnelly Act claim); *Omega Homes, Inc. v. City of Buffalo*, 4 F. Supp. 2d 187, 194-95 (W.D.N.Y. 1998) (declining jurisdiction over Donnelly Act claims after dismissing federal antitrust claims).

Similarly, the Court should decline jurisdiction over the plaintiffs' claims of tortious interference against the defendant contractors. The analogous claims against Local 3 were previously dismissed. *U.S. Infor. Sys.*, 2002 U.S. Dist. LEXIS 1038, 2002 WL 91625, at *13.

Conclusion

For the reasons set forth above, I recommend that summary judgment be granted to the defendants, and that the plaintiffs' claims under § 1 of the Sherman Act

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24. One federal district court opinion rejected claims under both § 1 of the Sherman Act and the Donnelly Act because, based on the evidence, an inference of conspiracy was no more plausible than a finding that the defendants had acted unilaterally. *Tokarz v. LOT Polish Airlines*, No. 96 CV 3154, 2006 U.S. Dist. LEXIS 72118, 2006 WL 2850611, at *4-*5 (E.D.N.Y. Oct. 3, 2006). The court relied, however, only on the general proposition that the Donnelly Act is construed consistently with the Sherman Act. 2006 U.S. Dist. LEXIS 72118, [WL] at *3.

be dismissed. I further recommend that the plaintiffs' remaining state law claims be dismissed without prejudice. Pursuant to 28 U.S.C. § 636(b)(1) and Rules 72, 6(a), and 6(e) of the Federal Rules of Civil Procedure, the parties shall have ten (10) days from this date to file written objections to this Report and Recommendation. Such objections shall be filed with the Clerk of the Court, with extra copies delivered to the chambers of the Honorable Richard M. Berman, U.S.D.J., Room 650, and to the chambers of the undersigned, Room 1960, 500 Pearl Street, New York, New York 10007. Failure to file timely objections will preclude appellate review.

Respectfully submitted,

s/ James C. Francis IV
JAMES C. FRANCIS IV
UNITED STATES MAGISTRATE JUDGE

Dated: New York, New York
August 3, 2007

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING PETITION FOR REHEARING FILED MAY 12, 2010

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 12th day of May, two thousand ten.

No. 07-4214-cv

U.S. INFORMATION SYSTEMS, INC., ODYSSEY GROUP INC., and BLUE DIAMOND FIBER OPTIC NETWORKS, INC.,

Plaintiffs-Counter-Defendants-Appellants,

- v -

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION NUMBER 3, ADCO ELECTRICAL CORPORATION, FIVE STAR ELECTRIC CORPORATION, NEAD INFORMATION SYSTEMS, and HUGH O'KANE ELECTRIC COMPANY LLC,

Defendants-Appellees,

Appendix D

A & R ELECTRICAL, MAINTENANCE, INC., FOREST ELECTRIC CORPORATION, and IPC COMMUNICATIONS, INC.,

Defendants,

A R COMMUNICATIONS CONTRACTORS INC.,

Counter-Claimant-Appellee.

U.S. Information Systems, Inc., Odyssey Group Inc. and Blue Diamond Fiber Optic Networks, Inc., having filed a petition for panel rehearing or, in the alternative, for rehearing *en banc*, and the panel that determined the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing *en banc*,

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe,
Clerk of the Court

APPENDIX E — STATUTORY PROVISIONS INVOLVED

This case concerns Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1:

> **Trusts, etc., in restraint of trade illegal; penalty**
>
> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

and Rule 56 of the Federal Rules of Civil Procedure:

Appendix E

RULE 56. SUMMARY JUDGMENT

(a) By a Claiming Party.

A party claiming relief may move, with or without supporting affidavits, for summary judgment on all or part of the claim.

(b) By a Defending Party.

A party against whom relief is sought may move, with or without supporting affidavits, for summary judgment on all or part of the claim.

(c) Time for a Motion, Response, and Reply; Proceedings.

(1) These times apply unless a different time is set by local rule or the court orders otherwise:

(A) a party may move for summary judgment at any time until 30 days after the close of all discovery;

(B) a party opposing the motion must file a response within 21 days after the motion is served or a responsive pleading is due, whichever is later; and

(C) the movant may file a reply within 14 days after the response is served.

(2) The judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.

(d) Case Not Fully Adjudicated on the Motion.

(1) Establishing Facts.

If summary judgment is not rendered on the whole action, the court should, to the extent practicable, determine what material facts are not genuinely at issue. The court should so determine by examining the pleadings and evidence before it and by interrogating the attorneys. It should then issue an order specifying what facts — including items of damages or other relief — are not genuinely at issue. The facts so specified must be treated as established in the action.

(2) Establishing Liability.

An interlocutory summary judgment may be rendered on liability alone, even if there is a genuine issue on the amount of damages.

(e) Affidavits; Further Testimony.

(1) In General.

Appendix E

A supporting or opposing affidavit must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated. If a paper or part of a paper is referred to in an affidavit, a sworn or certified copy must be attached to or served with the affidavit. The court may permit an affidavit to be supplemented or opposed by depositions, answers to interrogatories, or additional affidavits.

(2) Opposing Party's Obligation to Respond.

When a motion for summary judgment is properly made and supported, an opposing party may not rely merely on allegations or denials in its own pleading; rather, its response must — by affidavits or as otherwise provided in this rule — set out specific facts showing a genuine issue for trial. If the opposing party does not so respond, summary judgment should, if appropriate, be entered against that party.

(f) When Affidavits Are Unavailable.

If a party opposing the motion shows by affidavit that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

(1) deny the motion;